

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
TWI Cable Inc., d/b/a Time Warner Cable	)	
	)	CSR 5878-E
Petition for Determination of Effective	)	
Competition in the City of Live Oak, Florida	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 1, 2002**

**Released: October 4, 2002**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. TWI Cable, Inc., d/b/a Time Warner Cable ("Time Warner") has filed with the Commission a petition alleging that Time Warner is subject to effective competition from competing service providers in its Live Oak, Florida franchise area. Time Warner alleges that its' cable system is subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act"),<sup>1</sup> and Sections 76.7(a)(1) and 76.905(b)(2) of the Commission's rules.<sup>2</sup> Time Warner bases its allegation of effective competition on the competing services provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and DISH Network ("DISH"). The City of Live Oak filed an opposition to which Time Warner replied.

**II. DISCUSSION**

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>3</sup> as that term is defined by Section 76.905 of the Commission's rules.<sup>4</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. Based on the record in this proceeding, Time Warner has met this burden.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the

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<sup>1</sup> 47 U.S.C. § 543.

<sup>2</sup> 47 C.F.R. §§ 76.7(a)(1) and 76.905(b)(2).

<sup>3</sup> 47 C.F.R. § 76.906.

<sup>4</sup> 47 C.F.R. § 76.905.

households in the franchise area.<sup>5</sup>

4. Turning to the first prong of the competing provider test, we find that the programming of DBS providers, such as DirecTV and DISH, satisfy the Commission's programming comparability criterion. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.<sup>6</sup> Time Warner has provided evidence of the advertising of DBS service in the local media serving its Live Oak franchise area.<sup>7</sup> With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer at least 12 channels of video programming, including at least one non-broadcast channel.<sup>8</sup> We find that Time Warner has demonstrated that Live Oak is served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Time Warner also demonstrated on this record that the two DBS providers are physically able to offer MVPD service to subscribers in Live Oak, that there exists no regulatory, technical, or other impediments to households within Live Oak taking the services of the DBS providers, and that potential subscribers in Live Oak have been made reasonably aware of the MVPD services of DirecTV and DISH.<sup>9</sup> Therefore, the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Time Warner sought to determine the competing provider penetration by purchasing a franchise-specific zip code plus four subscriber report from SkyTrends that identified the DBS subscribers in the Time Warner franchise area.<sup>10</sup> Live Oak filed an opposition questioning "the validity and the accuracy of the data submitted" by Time Warner.<sup>11</sup> More specifically, Live Oak asserts that "the data provided to Time Warner by SkyTrends is flawed" and argues that Time Warner made no effort to independently verify the SkyTrends data.<sup>12</sup> In reply, Time Warner argues that Live Oak fails to specify how the SkyTrends data is flawed or offer a reliable alternative to purchasing SkyTrends data for purposes of demonstrating effective competition.<sup>13</sup> In addition, Time Warner states that the Commission has in numerous proceedings accepted SkyTrends data for purposes of determining competing provider penetration rates for purposes of effective competition.<sup>14</sup> Live Oak asserts without explanation or support that the SkyTrends data submitted by Time Warner is inaccurate and flawed. We disagree. As Time Warner notes, the Commission has consistently accepted SkyTrends data as reliable for purposes of

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<sup>5</sup> 47 U.S.C. §543(1)(1)(B); *see also* 47 C.F.R. §76.905(b)(2).

<sup>6</sup> *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

<sup>7</sup> Time Warner Petition at 3-4 and Exhibit A.

<sup>8</sup> *See* 47 C.F.R. § 76.905(g); *see also* Time Warner Petition at 4 and Exhibits C, D, and E.

<sup>9</sup> Time Warner Petition at 3-4 and Exhibit A.

<sup>10</sup> *Id.* at 5 and Exhibit B.

<sup>11</sup> Live Oak Opposition at 1.

<sup>12</sup> *Id.*

<sup>13</sup> Time Warner Reply at 1.

<sup>14</sup> *Id.* at 1-2.

effective competition determinations.<sup>15</sup> Time Warner has demonstrated that the zip code plus four subscriber data it received from SkyTrends was specific to Time Warner's Live Oak franchise area. Live Oak presents no evidence to call into question the validity of the SkyTrends report submitted by Time Warner. Accordingly, we will accept as reliable the number of Live Oak DBS subscribers indicated in Time Warner's petition.

6. Turning to the competitive penetration level in Live Oak, Time Warner asserts that it is the largest MVPD because its subscribers outnumber the aggregate DBS subscribership in Live Oak.<sup>16</sup> Time Warner submitted Census 2000 data indicating that there are 2,361 households in Live Oak.<sup>17</sup> Based on the aggregate 452 DBS subscribers in Live Oak, we calculate that the competing provider penetration rate in Live Oak is 19 percent.<sup>18</sup> We find that Time Warner has demonstrated that the number of households subscribing to programming services offered by providers, other than the largest MVPD, exceeds 15 percent of the households in Live Oak. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that its cable system serving the City of Live Oak, Florida is subject to effective competition.

### III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by TWI Cable, Inc., d/b/a Time Warner Cable **IS GRANTED**.

8. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>19</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Deputy Chief, Policy Division, Media Bureau

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<sup>15</sup> See, e.g., *Falcon Cable Systems Company II*, 17 FCC Rcd 4648, 4650-51 (CSB 2002) ("We find this method [zip code plus four] of determining DBS subscribers within a franchise area to be reasonable and sufficiently reliable for purposes of determining the presence of effective competition.").

<sup>16</sup> Time Warner Petition at 5.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (452 DBS subscribers ÷ 2,361 Live Oak households = 19.14%).

<sup>19</sup> 47 C.F.R. § 0.283.